IN THE

Supreme Court of the United States

No.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff,

versus

CHARLES A. PATOUT ET AL.,
Defendants.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff,

versus

VERMILION DEVELOPMENT CO., INC.,
Defendant.

CONSOLIDATED

BRIEF ON BEHALF OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL DECISIONS OF THE LOUISIANA STATE SUPREME COURT.

May It Please the Court:

This opposition to the petition of the plaintiff is directed to two issues, either of which would preclude this court from issuing writs of certiorari to review the decisions of the Louisiana Supreme Court. They are:

1. Lack of jurisdiction.

2. Lack of federal question.

LACK OF JURISDICTION

Rule 19 of the rules of this Court sets forth the guidelines concerning the granting of writs of certiorari. Insofar as the matters now before the Court are concerned, there must have been a state court decision on a federal question of substance not heretofore determined by this court, or a decision in a way probably not in accord with applicable decisions of the Court.

Rule 23(1)(f) provides in substance, that the petition for writs of certiorari to review the judgment of a state court shall specify the stage of the proceedings in the court of first instance and in the appellate court at which, and in what manner, the federal questions sought to be reviewed were raised and the way in which they were passed upon by the court so as to show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The sole federal question asserted by the plaintiff is based on the alleged fact that 90% of the funds involved in these expropriations suits are paid by the Federal Government under the authority of 23 USCA Section 101 et seq., and that the monetary awards constitute unreasonable burdens upon the state and federal treasuries and unreasonably hamper the accomplishment of the congressional policy and national intent to construct a system of National Defense Highways. See pages 2 and 3 of plaintiff's petition.

On page 7 of plaintiff's petition the following statements appear:

> "Although the federal question of the use of federal funds and the unreasonable burden placed upon the federal and state treasuries was implicit in the proceedings at all times, the question, as such, was never placed at issue, nor could it be until this time, in the nature of the case."
>
> "1(G) The application here is to review the decision of a state court and not a federal court."

Notwithstanding the admission by the plaintiff that the alleged federal question was never placed at issue at any stage of the proceedings in the state courts, counsel for defendants have requested the Clerk of the Louisiana Supreme Court to certify and forward the entire record in these proceedings — voluminous as it may be — so that all proceedings in the original and appellate courts may be examined for verification of this fact. (The plaintiff requested that only a few of the documents be forwarded.)

Since the alleged federal question was never raised, preserved or passed on in the state courts below, this court is constrained to dismiss the petition for writs on the basis of the recent case of *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161 (1969), wherein this court held,

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state court below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L. Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Nor-

wood's Lessee, 5 Cranch 344, 3 L. Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller for Use of United States v. Nicholls, 4 Wheat. 311, 315, 4 L. Ed. 578 (1819), and since." (Citing cases).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189 (1966), they should be given the first opportunity to consider them."

LACK OF FEDERAL QUESTION

A reading of the Louisiana Supreme Court decisions here under consideration will show that (a) the expropriation proceedings were instituted under the Louisiana "quick taking" statute, (b) title to the properties involved was taken in the name of the State Louisiana, (c) all court proceedings were in accordance with Louisiana law,

(d) the sole questions at issue were the amounts of compensation to which the defendants were entitled, (e) the awards of just compensation were based on the constitution, statutes and decisions of Louisiana, and (f) the awards were in favor of the defendants and against the State of Louisiana, through the Department of Highways.

An analysis of the case of the *State of Delaware upon the Relation of the State Highway Department v. George F. Lang Company*, (S.C. Del., 1963), 191 A. 2d 322, should convince this court that the alleged federal questions, i.e., basically, the amount of just compensation to which the defendants are entitled, has no legal foundation and that state law and not federal law governs.

The *Lang* case involved an eminent domain proceeding to acquire land on which to construct a freeway through the city of Wilmington, Delaware, which would be part of the National System of Interstate and Defense Highways. The construction of the highway had been approved by the State Highway Department, and all planning, engineering and construction had been carried out by it. Fee simple title to all rights-of-way had been taken in the name of the State of Delaware. The provisions of the Federal Aid Highway Act (23 U.S.C.A., Sec. 101 et seq.) had been complied with, and, by reason thereof, the State of Delaware would receive from the Federal Government reimbursement of 90% of the amount spent on the highway. The Delaware Supreme Court certified three questions, one of which was,

> "3. Is the measure of just compensation to which the defendant is entitled governed by State law and procedures or Federal law and procedures?"

The Court answered the question as follows, 191 A. 2d 322, 326,

> "The argument of the landowner under this question is that since 90% of the funds to be used in the acquisition of land for and the construction of Interstate Route 95 will in the last analysis be Federal funds, the measure of just compensation to which the landowner is entitled should be governed by Federal law and procedures."
>
> "The difficulty the landowner labors under in this respect is that its land is being condemned by the State, fee simple title to it will be taken and remain in the name of the State, and its compensation will be paid from State funds—all in order to accomplish a State public purpose. The fact that the State may later be reimbursed in part by the Federal Government has no materiality to the problem."
>
> "The answer to Question No. 3 is that the measure of just compensation to which the defendant is entitled is governed by State law and procedures."

In the case now before this court, the plaintiff contends, for the first time, that since the Federal Aid Highway Act is involved, this Court should assume jurisdiction because of the alleged federal question. The *Lang* case is absolute authority to the contrary inasmuch as the matter of just compensation is to be decided under state laws and procedures.

Wherefore, defendants pray that the petition for writs of certiorari to review the final decisions of the Louisiana Supreme Court in the cases of *State of Louisiana, Through the Department of Highways vs. Vermilion Development*

Company, 249 So. 2d 167; and *Same v. Charles A. Patout et al*, 249 So. 2d 179, should be denied.

Respectfully submitted,

/s/ JAMES W. BEAN
JAMES W. BEAN,
Member of Court

SMITH & STANSBURY

By: /s/ FRANK SMITH, JR.
FRANK SMITH, JR.,
Trial and Appellate Counsel
in State Courts

Attorneys for Defendants

CERTIFICATE

I hereby certify that a copy of the foregoing brief has been served on counsel for the plaintiffs by mailing same to their post office address, was requisite postage affixed, on the .....day of September, 1971.

JAMES W. BEAN